

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 327 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

THAKOR BABUJI SONAJI

Versus

STATE OF GUJARAT

Appearance:

MR PM VYAS appointed by way of legal aid for Petitioner
MR ND GOHIL, LD. APP for Respondent No. 1

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 06/03/98

ORAL JUDGEMENT

1. The appellant herein, hereinafter referred to as 'the accused', then aged 22 years, came to be charged for the offences punishable under sections 363 and 376 of the Indian Penal Code (for short 'IPC') on the allegations that he had kidnapped prosecutrix, Jamiben then aged above 17 years and below 18 years from the lawful guardianship of her father Choudhari Motibhai Galbabbhai

and entered into voluntary sexual intercourse against her will and without her consent. Upon such a charge the accused was tried before the learned Addl. Sessions Judge, Mehsana in Sessions Case No. 110 of 1994. Upon conclusion of trial and after hearing the submissions made on behalf of both the sides the learned Addl. Sessions Judge by his impugned judgment and order dated 14/2/1995 convicted the accused for the aforesaid offences and sentenced him to undergo rigorous imprisonment for a period of 7 years and to pay fine of Rs.500/- in default to undergo rigorous imprisonment for a period of two months in respect of each of the charges. The accused has prayed for quashing his conviction and sentence as aforesaid.

2. The prosecution case may briefly be stated :

Complainant Choudhari Motibhai Galbabhai has been an agriculturist of Madrapur, Taluka Kheralu having in his family two sons and two daughters respectively Ramji, Abheraj, Jamiben and Hansa, out of whom Jamiben was below 18 years of age on 14/4/1994, when the accused who was serving as an agricultural labour with Choudhari Lavajibhai Motibhai in the same village had induced Jamiben to accompany him by offering her Pan and promising her to take her to Ambaji and buy for her good bangles and clothes. This happened at about 8.00 O'clock at night when Jamiben left for attending to call of nature with a tin of water with her. Since Jamiben did not return for about an hour, the complainant, his wife Jivatben and daughter Hansa made inquiries in the nearby places and found that the tin was lying empty behind the house. The complainant, therefore, informed his wife's brother Savajibhai and relative Lavajibhai Ramsangbhai about his daughter Jamiben having not been found. The complainant, therefore, in the company of the said persons went in the village and the outskirts of the village for inquiring about the whereabouts of complainant's daughter Jamiben. On their way one Athabhai Samtabhai met them and on being asked he informed them that the accused and Jamiben were proceeding towards the road of village Valapura before about half an hour and accused was walking ahead of Jamiben and Jamiben was following him. Inquiring about Jamiben on that road and in village Valapura the complainant and the persons accompanying him did not find Jamiben there. After making inquiries at village Danta, village Panodra and other villages Jamiben's father Motibhai gave complaint to the police. After registering the offence the police started investigation and went to Vadera, the native place of accused, where the police traced out the accused and Jamiben, the prosecutrix, from

the hills of Vadera. Jamiben was sent for medical examination after investigation into the matter and after receipt of the medical reports and reports from the Forensic Science Laboratory the accused came to be prosecuted as stated above.

3. It has been the defence of the accused and it has all throughout been submitted that there was an affair between the accused and Jamiben for a period of nearly two years before the date of incident, that the prosecutrix Jamiben did not want to marry with the person with whom she was engaged, that on the day of incident she had taken the accused with her and that she had sexual intercourse with the accused of her own will and her own consent. This defence has been negatived by the learned Addl. Sessions Judge while convicting the accused as aforesaid.

4. The prosecution examined following witnesses at the trial -

- (i) P.W.1 Dr. Tusharbhai Mohanbhai Shetalvad, exh.7
- (ii) P.W.2 Choudhari Motibhai Galbabhai, the complainant exh. 12,
- (iii) P.W.3 Jamiben Motibhai, the prosecutrix exh. 14,
- (iv) P.W.4 Lavjibhai Motibhai, the employer of the accused, exh. 15
- (v) P.W. 5 Hathabhai Samtabhai, exh. 16
- (vi) P.W. 6 Banajibhai Nathubhai Choudhari, the panch witness, exh. 17,
- (vii) P.W.7 Jashvantsinh Mohbatsinh Rathod, Investigating Officer, exh. 24, and
- (viii) P.W.8 Lavajibhai Khemabhai Vankar, the teacher who was examined in respect of the age of the prosecutrix, exh. 31.

5. The prosecution also placed on record following documents :-

- (i) Medical certificate regarding prosecutrix, exh.8
- (ii) Medical certificate regarding accused, exh. 9
- (iii) Panchnamas of scene of offence, place of open space behind the house of the complainant, of clothes of the accused and of clothes of the prosecutrix, exhs. 17, 18, 19, 20 and 21.
- (iv) F.S.L. reports exhs. 26 and 29 with forwarding letter exh. 25.

6. The facts of the prosecution case as can be noticed from the evidence of the complainant coupled with the evidence of the prosecutrix would require a close

scrutiny. For the purpose of appreciation of evidence of these two important witnesses it would be necessary to ascertain what was the age of prosecutrix at the time of the incident. It might be noticed from the evidence of the complainant and the prosecutrix Jamiben that the age of the prosecutrix has been stated to be 15 years. However, the investigation has revealed that prosecutrix Jamiben was admitted to a school where her birth date was registered. It has also come in the evidence of the complainant that the birth of Jamiben was registered in the register of births and deaths maintained in the village records. However, such documentary evidence has not been made available by the investigation before the Court. However, inspite of the fact that the complainant and the prosecutrix have come out with the case that the age of prosecutrix to be 15 years at the time of incident, there has been positive evidence with regard to age of prosecutrix. Reference in this connection may be made to the oral evidence of P.W.8 Lavajibhai Khemabhai Vankar exh. 31. He was the teacher in the school in which prosecutrix Jamiben was admitted initially. According to his evidence Bai Jami was admitted in the school in which he had been serving as a teacher for nearly about 34 years. The birth date of Jamiben was recorded as 1st June, 1976. The extract from the students' register maintained in the school has been placed on record through this witness, at exh. 32. It has thus appeared that hardly 2 months were left for Jamiben to complete 18 years of age on the date of incident, namely 14/4/1994. She was accordingly aged 17 years and around 10 months on the date of incident. This fact would assume a great deal of importance in appreciating the evidence of the complainant and the prosecutrix particularly when both of them have come with oral version regarding the age of prosecutrix being 15 years on the date of the incident. It would, therefore, be clear that although from the stand point of age section 361 of the IPC would have technical application, section 376 read with section 375 of IPC would have no application if willingness and conseIt on the part of the prosecutrix is shown from the facts and circumstances of the case.

7. Scanning the evidence of the complainant and the prosecutrix it would clearly appear that the prosecutrix left with the accused at around 8.00 O'clock at night on 14/4/1994. The allegations are to the effect that when prosecutrix went for attending call of nature in the open space behind the house of the complainant, the accused induced her to leave with him. The allegation is that the accused offered her a Pan and promised her to take

her to Ambaji and to take good bangles and clothes for her. For these allegations there is no other evidence except the evidence of the prosecutrix and this evidence needs scrutiny in the light of the facts and circumstances attending the prosecutrix joining the accused and remaining in his company for a period of around 3 days. It has been in the evidence of the concerned witnesses, after the prosecutrix left in the company of the accused one Hathabhai Samtabhai saw them on their way to the bus stand. Hathabhai Samtabhai P.W. 5 exh. 16 has deposed that he saw the accused and the prosecutrix at about 8.30 O'clock at night. In his cross examination he has admitted that he did not have any talk with Jamiben when Jamiben was following the accused at a distance of about 2 ft. Jamiben admitted in her cross-examination that Hathabhai asked her where she and the accused were going, but she did not speak a word. She also admitted that there were about 15 passengers in the S.T. Bus which was proceeding towards Daol Via Dabhan. She has admitted that from Daol accused and herself walked out distance for Danta. As against that her stand in the examination in chief was that she and the accused went from Daol to Panodra by bus and from Panodra accused had taken her in the hilly outskirts of Vadvera. It is an admitted position that Jamiben did not make any complaint to any body during the course of 3 days when she was in the company of the accused. Now it is highly improbable that if accused had taken her away on a false inducement as aforesaid, she would keep silent throughout the aforesaid period of 3 days. Besides, despite the fact that she was engaged with some one else, she had eloped with the accused, may be on some inducement. This would go to indicate that she had a sort of prior concert with the accused. This would also display a sort of liking on the part of the prosecutrix for the accused. Thus right from the inception Bai Jamiben, prosecutrix must have had a clear willingness and consent for joining the accused. It is her case that on a couple of occasions she had sexual intercourse with the accused and yet she did not try to escape or make any complaint before anybody. A very lame excuse has been put forward by her in her evidence to the effect that the accused threatened her of life and, therefore, she suffered sexual violence from the accused. What was the nature of sexual violence might be visualised from the medical evidence which will be noted soon hereafter. Suffice it to say that the evidence of the prosecutrix and the complainant with regard to the prosecutrix having eloped with the accused does not sound natural, probable and acceptable in the light of the circumstances which have been noted hereinabove, if the matter is examined

from the stand point of willingness and consent on the part of the prosecutrix to have sexual relation with the accused. It might be recalled that the prosecutrix was nearly 18 years of age whereas the accused was around 22 years of age. Accused was comparatively a person without any assistance or acquaintance in the village where he was serving. The prosecutrix was having all the support in the village inasmuch as she had her parents and other relatives and villagers in the village. In the background of such atmosphere it would highly be improbable that the prosecutrix would have without her own willingness and consent joined the accused and remained in his company for a period of around 3 days till upto the time they were searched out by the police from the hilly area of village Vedvada.

8. It is now time to note medical evidence concerning the prosecutrix upon she having been sent for her medical examination soon after she and accused were searched out by the police. Clinical examination of Jamiben revealed :-

- (i) There was no external mark of injury on any part of the body.
- (ii) There was no presence of Hymen of Vaginal orifice
- (iii) There were multiple small laceration over vaginal orifice and in the vaginal wall with presence of infection.
- (iv) No Spermato was seen in the microscopic examination.
- (v) She was conscious and her blood pressure was normal.

The medical witness P.W. 1 Dr. Tusharbhai Mohanbhai Shetalwad exh. 7 deposed that he opined about sexual intercourse having taken place with Jamiben - the prosecutrix within 48 hours before her medical examination by him. He further deposed that there might be intercourse even prior to 48 hours of her examination. In her cross-examination the witness had admitted that he had taken the history of Jamiben, the prosecutrix, but he did not noted such history in the case papers and the medical certificate. According to his admission Vaginal portion was quite developed.

9. The aforesaid medical evidence concerning the prosecutrix would clearly reveal that there was/were no external mark/marks of injury/injuries on any part of Bai Jamiben's body. This would indicate lack of any resistance on the part of the prosecutrix. It has been submitted that on account of some threats from the

accused as deposed to by the prosecutrix, she might be a passive participant to the sexual intercourse. However, it is not that she had only one occasion of sexual intercourse. The prosecutrix complained of sexual intercourse by the accused with her on a couple of occasions during the period of 3 days she was with him. On neither of the occasions she attempted to escape or to resist the sexual act on the part of the accused. Coupled with the medical evidence and coupled with the evidence with regard to age, the facts of the case as noted above would clearly indicate that the accused had sexual intercourse with the prosecutrix not against her will and not against her consent.

10. Section 375 of the IPC says that for a sexual intercourse by a man with a woman to be treated as "rape", the same must be against the will of the woman or must be without her consent. The charge against the accused is not under the third exception namely her consent had been obtained by putting her in fear of death. When the prosecutrix and the accused were searched out by the police, there was already a complaint lodged by the father of the prosecutrix. The investigation was apparently launched in a specific direction. Thus, bearing in mind all the facts and circumstances, the oral evidence of the prosecutrix with regard to her sexual relation with the accused for the period in question could not be accepted and it could not be said that the accused had sexual intercourse against her will or without her consent. On going through the judgment impugned in this appeal it clearly appears that the learned Addl. Sessions Judge has failed to notice the aforesaid glaring circumstances of the case in appreciating the evidence of the prosecutrix and the complainant. It has been suggested in the evidence of the prosecutrix that her mother and her sister were knowing about she leaving the house in the company of the accused. It is no-doubt true that the prosecutrix denied this suggestion in her cross-examination, but after such a suggestion was made in the evidence of the prosecutrix the prosecution has dropped Jivatben, mother of the prosecutrix, who was cited as a witness. In fact number of witnesses have been dropped as can be seen from the pursis exh. 22. This would assume importance in appreciating the evidence adduced by the prosecution. In my opinion, therefore, it was not merely a passive submission on the part of the prosecutrix to the sexual intercourse which the accused had with her on couple of occasions, but the circumstances would indicate a clear consent and willingness on the part of the prosecutrix for having sexual intercourse with the accused during the

aforesaid period. Her failure to appeal to her relatives or any person whom she met on her way with the accused and her conduct of following/joining the accused and remaining in his company for such a long period and her allowing him to have his stay with her to the extent of satisfying his lust in full would make it clear that there must have been willingness and consent on the part of the prosecutrix as aforesaid.

11. Thus on the assessment of the testimonial potency of the victim's version as well as the evidence of the complainant in the light of the circumstances noted hereinabove the offence of rape punishable u/S. 376 of the IPC charged against the accused cannot be said to have been made out beyond reasonable doubt.

12. It might be noted from the defence as well as from the statement of the accused that there is no positive overt act suggested to the prosecutrix for saying that she had taken away the accused. In fact the prosecution has established beyond reasonable doubt about the accused having initiated onward march in the company of the prosecutrix. It is a different matter that there might have been some relation between the two, but law does not allow taking away of girl aged below 18 years from the lawful guardianship of her parent. Reference in this connection has been made by the learned Addl. Sessions Judge as also by the learned A.P.P. for the State before this Court to the case of State of Haryana v. Raja Ram reported in AIR 1973 S.C. 819. The Apex Court has observed that persuasion by the accused person which creates willingness on the part of the minor would be sufficient to attract the provision contained in section 361 of the IPC and the consent of such minor for the purpose of that provision would become immaterial.

13. In Varadarajan v. State of Madras reported in AIR 1965 SC 942 referred to by Mr. P.M. Vyas, learned advocate appearing for the appellant, victim was college going girl on verge of majority, telephoning the accused and meeting him and going with him to the office of Sub-Registrar for registering marriage agreement. In the background of such facts the Apex Court observed that the case was lifted out of "taking or enticing away a minor out of the keeping of a lawful guardian" being an essential ingredient of the offence of kidnapping. Thus, the facts of Varadarajan's case (supra) were quite different and distinct. In the present case, although the accused would stand exonerated of the charge u/S. 376 of the IPC the circumstances stand to show that the girl had eloped with him without there being any overt

act at the time of incident on the part of the prosecutrix. In the facts of the case, therefore, the accused could not be exonerated from the charge of kidnapping u/S. 363 of the IPC. Of-course he had not been charged with the offence punishable u/S. 366 of the IPC. In the facts of the case, therefore, the ingredients of section 361 read with sec. 363 of the IPC had been made out. See Bhushan Lal v. State of Madhya Pradesh reported in Cr.L.J. (SC) 1988 at page 111.

14. In the result, the conviction and sentence of the accused u/S. 376 of the IPC shall have to be quashed and set aside; whereas his conviction u/S. 363 of the IPC shall have to be maintained.

15. I have heard the learned advocate appearing for the accused as well as learned A.P.P. for the State on the question of sentence. There is no minimum prescribed u/S. 363 of the IPC. At the time of the incident in question the prosecutrix was nearly 18 years of age although below that age. At the time of incident the accused was also quite young aged about 22 years. The aforesaid facts and circumstances of the case would also assume importance on the question of sentence. The accused was apprehended somewhere in the month of April 1994 and since then he has been in jail. Thus, he has undergone nearly 4 years of sentence. In my opinion, he has undergone more than sufficient sentence which could be imposed upon him for the offence punishable u/S. 363 of the IPC under the aforesaid circumstances. In that view of the matter, it would be just and proper to reduce the sentence to the extent already undergone by him inclusive of sentence in default of fine. Following order is, therefore, passed :-

This appeal is partly allowed. The appellant's (accused's) conviction and sentence u/S. 376 of the IPC is hereby quashed and set aside. His conviction u/S. 363 of the IPC is hereby maintained. His sentence for the said provision is hereby reduced to the sentence already undergone by him including default sentence. He shall, therefore, be released forthwith if not required for any other case. The judgment and order of the learned Addl. Sessions Judge, Mehsana in Sessions Case No. 110 of 1994 shall accordingly stand partly set aside.

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PVR cr.a32795j.